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**Are the errors in criminal proceeding or crimes
against the justice and interests of service?**

Abstract: The vast majority of violations in criminal proceedings are committed intentionally out of subjective motives, which excludes their attribution to the errors.

All errors of representatives of the bodies conducting the criminal process that entail causing substantial harm to the rights and interests of individuals and legal entities should be given an appropriate assessment, consisting in making a decision (a decree) on the presence or absence of a crime.

Keywords: criminal proceedings; an error; intention; crimes against the justice and interests of service; concealment; corruption; arbitrariness.

There is no consensus among the researchers concerning the notion, signs and causes of the errors in criminal proceeding however at this everybody practically excludes an existence of the intention.

So, N.L. Granat determines an error in criminal process as "... an inaccuracy, incorrectness, infidelity, blunder or action that does not lead to the achievement of the goal. It is assumed that the distortion in cognition or deviation from the goal was not deliberate, i.e. are the result of a honest mistake ... As a general rule, on the basis of which the wrong actions of an investigator should be considered as mistake, we should mention the absence of guilt in those classical forms that are known in the theory of law" [2, p. 57].

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In opinion of N.I. Klimenko, an error is the result of an expert's honest mistake, but at the same time he admits that the error may also be a consequence of a deliberate violation by an expert of the requirements of research methodology [3, p. 38].

Also Z.F. Kovriga notes that judicial and investigative error is "an unintentional distorted knowledge of objective reality" [5, p. 63].

A.A. Shirvanov considers that "...under the error in criminal proceedings should be understood an act, which formally not contrary to the norms (norm) of criminal procedure law, committed as a result of honest mistake by a subject of criminal procedural relations in the form of action or inaction at any stage of criminal proceedings, which by deprivation or limitation of the rights guaranteed by law to the participants of criminal proceedings or in any other way affected the legality, validity or fairness of the decision taken in a case" [9, p. 57].

The core of problem is summarized by R.S. Belkin: "namely a bona fide delusion that distinguishes a mistake in legal proceedings from professional omissions, violations, misconduct, and even crimes against justice. Any obviously wrong action, judgement, violation of the established norms of the law is not a mistake and it requires something other, than a reaction of error" [1, p. 166].

At the same time, there are also the standpoints in procedural literature, according to which the deliberate neglect of an investigator by the requirements of criminal procedure law is attributed to errors [8, c. 118], and also it raised the question of judge's right to an error [4, p. 47].

It appears that the fallibility of such statements is uniquely identified by R.S. Belkin and M.S. Strogovich, who pointed out: "...the right to an error does not arise from anywhere, either legally or ethically. Judicial errors were, are available now and their possibility should be reckoned in the future. But the right of judges to an error, as well as the right to an error of investigators and prosecutors in investigation and resolution of criminal cases, does not exist, there was no such



right before, no now, and will not be in the future. Judicial error is always a violation of the law. Who and when has the “right” to violate the legality! “The right to an error” in criminal proceedings is an immoral, and it can only give rise to further violations of law and morality” [6, p. 33].

Let’s try to review where is the line between errors and offenses, how to distinguish them and determine the share of responsibility.

According to the studies conducted by the International Organization for Legal Researches (hereinafter, the IOLR) in 2014-2018 in respect of 72 per cent of convicted for less grave, grave and especially grave crimes, sentences and decisions of all judicial instances have been imposed in violation of the basic principles and conditions of criminal proceedings, illegally.

Illegality of made decisions consisted of the lack of clarification of all the factual circumstances of the case, inconsistency of a court findings with the facts, the lack of evidence of accusation, incorrect application of the norms of criminal law, inconsistency of punishment with the gravity of crime and an identity of a convicted person, unjustified refusal to examine the evidence of defence party, violation of the requirements of Articles 143-146 of the CPC, making decisions on the basis of inadmissible evidence, etc.

All listed circumstances indicated in Articles 399 and 416 of the CPC as the grounds for cancellation or amendment of sentences and decisions of the courts in appeal and cassation orders.

According to the coded data of official statistics for 2014-2018, 38,278 people were convicted for less serious, grave and especially grave crimes, including 35,750 people were deprived freedom. 72% of the indicated amount is 27,560 and 25,740 people, respectively.

According to the results of study of the IOLR, of whole number of illegally convicted persons (100%), 12.13% (3,343-3,122) were convicted at the absence of an event of crime or corpus delicti, 54.52% (15,026-14,035) – failure to prove a



charge, 33.32% (9,183-8,576) – on exceeded charges, 0.029% (8-7) – upon the expiry of bringing to criminal liability.

When a respected among the relatives and neighbors member of the Supreme Court was acquainted with the results of the study, he questioned the objectivity of the conclusions of this study and had stated that errors could occur in any kind of human activity, judges are almost the same people as everyone, and therefore have also the right to an error, but not all errors in criminal proceedings affect on justice. Obviously, the judge does not familiar with the works of M.S. Strogovich and R.S. Belkin, which is not surprising.

First we will speak about responsibility. It appears that errors that caused to conviction of an innocent should definitely be regarded as a crime against the interests of the service - negligence with grave consequences. Here the harm caused to the rights and legitimate interests of persons is much more substantial than, for example, arising from a violation of the rules for accounting, storage and use of pyrotechnics, fire safety, safety of construction, assembling, mining and other works, etc.

Otherwise, what does it turn? Five years after passing the sentence, the convict's innocence is found out, and the author of the erroneous decision manages to move to the armchair of the Supreme Court by this time and to correct other people's errors there, perpetuating his own. It is unlikely that anyone will punish him, because he is already a monument.

Paradoxically, but in our time it is much easier to determine and recognize one or other action or decision an erroneous than to assert their deliberate illegality.

We will try to substantiate this assertion with specific examples.

On 1 September 2014 at his house No. 11 on Babek side street of Baku through causing numerous stab wounds was killed a former ranking officer of the Bureau of Technical Inventory an entrepreneur Fizuli Isgenderov.



At the same day on this fact the criminal case was instituted, an investigation of which had been conducted by a senior investigator of the prosecutor's office of Baku Mushfig Abbasov.

In January 2015, a spouse of the murdered man, Khalida Isgenderova and her youngest daughter, the minor Amana Isgenderli, sent many complaints to various bodies of authority and management that the investigation into the murder had conducted superficially; it was not checked the version about involvement to the crime the relatives of her husband and acquaintances of her elder daughter Bulbul Isgenderova to commission of murder of Fizuli Isgenderov with purpose to capture his multimillion property.

Having learnt of this, the relatives of the murdered man told Khalida Iskenderova that if she did not stop complaining and had not refused the inheritance, she would be sentenced to 18 years imprisonment, and would be killed in prison.

On 13 and 16 April 2015 investigator M. Abbasov recognised Khalida Isgenderova and Amana Isgenderli as the victims in the case, and on 30 April 2015 without any evidence through compiling the forged documents he detained Khalida Iskenderova as a suspect. On 1 May 2015 he indicted her under Article 120.2.4 of the Criminal Code and as a measure of restraint had chosen detention.

According to the charge, the motive for the murder was revenge of Iskenderova Khalida to her husband for not allowing her to visit the sick mother.

With the judgement of the Baku Court on Grave Crimes of 14 September 2016, Isgenderova Kh.I. without any evidence was convicted under Article 120.2.4 of the Criminal Code to 18 years in prison, as threatened her. By a decision of the Baku Court of Appeal of 08 June 2017, the judgement of the Baku Court on Grave Crimes was upheld, and by a decision of the Supreme Court of December 26, 2017, the decision of the Baku Court of Appeal was upheld.



In February 2018, relatives of Fizuli Isgenderov, about whose involvement in the murder complained of Khalida Isgenderova and Amana Isgenderli, appealed to the Nizami court of Baku with a claim to recover of moral and material damage from Khalida Isgenderova, as well as a recognition of Khalida Isgenderova and Amana Isgenderli as unworthy heirs.

By the decision of the Nizami court of Baku on 19 March 2018, the specified claim was denied.

However, on 13 August 2018, in violation of the decision of the Constitutional Court of the Republic of Azerbaijan of 13 December 2011 “On the interpretation of Article 1203.1 of the Civil Code of Azerbaijan Republic” the Baku Court of Appeal by its decision recognized Khalida Isgenderova as unworthy heir of Fizuli Isgenderov.

By an order of the Supreme Court of Azerbaijan Republic of 10 January 2019, the illegal decision of the Baku Court of Appeal of 13 August 2018 was upheld.

In the process of pre-trial production and trials proceedings in all instances, the defence of Khalida Isgenderova submitted a number of petitions and complaints about the forgeries and falsifications of evidence committed in the case, however all they were ignored.

In particular, in support of its arguments, the defence substantiated the following violations committed by the investigator and the courts in purposes of unlawful criminal prosecution of Kh. Isgenderova:

- falsification of the record of inspection of the scene of the incident by replacing several sheets in it (with purpose to conceal traces of blood of an unidentified person);

- falsification of record of checking of the testimony of Kh. Isgenderova and an expert’s report that based on it (the expert’s report is based on a record of checking of testimony, which has not yet been conducted);



- falsification of the record of additional inspection of the scene and the expert report (referral to the examination of a blood sample that was not detected);
- substitution of material evidence - a remote control of a car;
- falsification of the statement, the interrogation record and the record of verifying the testimony of the minor Amana Isgenderli (the same investigator committed various actions in different places of the city at the same time);
- falsification of records of inspection of telephones and records of court hearings (the telephones' memories contain data whose contents are distorted in the records);
- willful misrepresentation in the records of court hearings of the contents of the conclusion of a computer examination;
- concealment of facts of detection at the crime scene of traces of blood, hands and feet of an extraneous person - a killer;
- unlawful separation of a criminal case in order to conceal the fact of detection of traces of blood of a stranger at the scene of the incident;
- substitution of blood samples;
- refusal to interrogate defence witnesses (during the trial proceedings, no one of defence witness was interrogated);
- destruction of material evidence - a mask used in the attack;
- refusal to accept and study an alternative expert report, according to which the stabs to F. Isgenderov were caused by a man, etc. [7, p. 199-206].

There were several dozens of similar violations in the case, but no one of them was taken into account by any judicial instance as such, and, accordingly, not one of them was found to be as the grounds provided for by Articles 399 and 416 of the Code of Criminal Procedure.

Errors, but who recognizes them as such if the Supreme Court has brought the final decision in the case? Wait 6-7 years until the European Court deigns to start communications and hope that its members have a stable allergy to black caviar?



However...

In June 2019, Amana Isgenderli and her aunt Adylya Tagiyeva received evidence that Khalida Isgenderova, being innocent, was unlawfully held criminally liable and convicted, and also had recognized as an unworthy heir as a result of abuses by investigator Mushfig Abbasov and judges for the bribes received by them with the purpose to deprive Khalida Isgenderova and Amana Isgenderli of the multi-million inheritance of Fizuli Isgenderov.

It also appears from the materials received that to substantiate the unlawful decisions regarding Khalida Isgenderova, investigator Mushfig Abbasov and the judges were used deliberately false testimony from victims, witnesses, forged material evidence, records and other documents.

In particular, according to Adylya Tagiyeva, in June 2019, Bulbul Isgenderova (the eldest daughter of the murdered), in a telephone conversation with her, said that in 2015, she slandered Khalida Isgenderova by the persuasion the investigator Mushfig Abbasov and others persons who in return had promised to register on her name the house No. 11 in Babek's lane, Baku city, however, they deceived and had given nothing her.

In addition, in a telephone conversation Bulbul Iskenderova informed that she was an eyewitness to the conspiracy of the relatives on her father's side with the investigator Mushfig Abbasov who, at their request and for the large bribe, had fabricated the charge of Khalida Isgenderova and arrested her, then through his uncle working in the Supreme Court, spoke with the judges of the Baku Court of Grave Crimes, the Baku Court of Appeal and the Supreme Court, and again for the bribes had organized the approval of the judgement in respect of Khalida Isgenderova and making decisions on the recognition of her as unworthy heiress.

According to Bulbul Iskenderova, for this as the bribes to the investigator Mushfig Abbasov the real estate objects were transferred, parts of the money from the sale of which were used by him as bribes to the judges.



In support of her words, Bulbul Isgenderova forwarded from her phone to Adylya Tagiyeva's phone the records of the negotiations of bribe-givers with investigator Mushfig Abbasov regarding the receipt, size and distribution of the bribes for the unlawful bringing to criminal liability and conviction of Khalida Isgenderova, recognition of her and Amana Isgenderli as unworthy heirs.

In addition, in support of her words, Bulbul Isgenderova from her phone sent Adylya Tagiyeva to the phone SMS correspondence with investigator Mushfig Abbasov of similar content, as well as the copies of certificates, judicial and other documents confirming the transfer the immovable property to investigator Mushfig Abbasov as the bribes and subsequent manipulations with this property.

Consequently, it can be assumed that all violations (failure to clarify all the factual circumstances of the case, failure of evidence, inconsistency of the court findings with the facts, unreasonable refusal to examine the evidence of the defence, making decisions on the basis of inadmissible evidence, violation of the requirements of Articles 143-146 of the Code of Criminal Procedure and others), ascertained during pre-trial and trial proceedings in the case of Khalida Isgenderova, were committed intentionally, i.e. they are not errors.

If as a result of checking the statement of the defence of Kh. Isgenderova on revision of the case due to newly discovered circumstances, the information received from Bulbul Isgenderova would be confirmed, then the assumptions will take on the nature of allegations.

However, for this, at least, it is required the verification provided by Article 466 of the Code of Criminal Procedure.

However, within a few days after receiving the said application the judge of the Military (?) Chamber of the Supreme Court hastened to make a decision to leave it without consideration, although to check even obvious facts (establishing the identity of telephone conversations and SMS correspondence, familiarization



with court decisions on transferring to the investigator in the form of bribes the real estate, obtaining explanations, etc.) it would be taken significantly more time.

And why is the Military Chamber? Whether it is because that its member is the investigator's uncle, who appears in the information as an organizer of illegal decisions?

Summarizing the first part of the present article, it can be argued that all errors in criminal proceedings, depending on the damage, in mandatory order must be given an appropriate assessment, which will prevent the hidden intent of the followers of such practices, and the concealment (non-reacting) of revealed facts of crimes against justice and interests of the service is a crime, even for subjects of special proceedings.

So far, the judicial system is offside of Azerbaijani statehood.

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